

UNITED STATES v. BENJAMIN ERNEST JOHNSON
Sentencing on 11/08/2016

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 ASHEVILLE DIVISION
4

5 UNITED STATES OF AMERICA

ORIGINAL

6
7 v.

1:16-cr-6-MOC-DLH-1

8
9 BENJAMIN ERNEST JOHNSON
10

11
12 TRANSCRIPT OF SENTENCING PROCEEDINGS

13 NOVEMBER 8, 2016 at 2:00 p.m.

14 HONORABLE MAX O. COGBURN, JR.
15

16 APPEARANCES:

17 On behalf of the Government.:
18 OFFICE OF THE UNITED STATES ATTORNEY
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20 On behalf of the Defendant.
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23
24 Court Reporter: Randi Garcia

25 Stenograph with Computer Aided Transcription

1 *****PROCEEDINGS*****

2 THE COURT: United States versus
3 Benjamin Ernest Johnson. Is the defendant
4 ready?

5 MR. ATKINS: We are, Your Honor.

6 THE COURT: Is the government ready?

7 MR. THORNELOE: We are, Your Honor.
8 Thank you.

9 THE COURT: All right. If you would,
10 Mr. Johnson, please stand.

11 Mr. Johnson, you're called appearing
12 before the United States Magistrate Judge
13 for purposes of entering a plea of guilty
14 in this case.

15 MR. JOHNSON: Uh-huh.

16 THE COURT: I need you to answer
17 verbally, please.

18 MR. JOHNSON: Yes, your Honor.

19 THE COURT: Do you remember being
20 placed under oath at that time?

21 MR. JOHNSON: Yes, your Honor.

22 THE COURT: Do you remember answering
23 the questions of the Judge?

24 MR. JOHNSON: Yes, your Honor.

25 THE COURT: Do you remember signing a

1 plea transcript form when you stated that
2 the answers you gave the judge that day
3 were true and accurate to the best of your
4 knowledge?

5 MR. JOHNSON: Yes, your Honor.

6 THE COURT: The questions you were
7 asked by the judge, did you answer those
8 truthfully?

9 MR. JOHNSON: Yes, your Honor.

10 THE COURT: If I were to ask you the
11 same questions today, would your answers
12 be the same?

13 MR. JOHNSON: Yes, your Honor.

14 THE COURT: Thank you.

15 Counsel, do you believe your client
16 understood fully the questions that the
17 Magistrate Judge asked at the Rule 11
18 Hearing?

19 MR. ATKINS: I do, Judge Cogburn.
20 Thank you.

21 THE COURT: Mr. Johnson, did you
22 answer the questions the ways you did, and
23 are you going forward with your guilty
24 plea today because you did commit the
25 crime you are pleading guilty to?

1 MR. JOHNSON: Yes, your Honor.

2 THE COURT: Based upon those
3 representations and the answers given by
4 the defendant in the Rule 11 Hearing
5 before the Magistrate Judge, the Court
6 affirms the judge's finding that the
7 defendant's plea was knowingly and
8 voluntarily made.

9 The Court also affirms the judge's
10 findings that the defendant understood the
11 charges for the potential penalties and
12 the consequences of his plea.

13 Accordingly, the Court affirms the
14 Magistrate Judge's acceptance of the
15 defendant's plea of guilty at the Rule 11
16 Hearing and accepts the same here today.

17 Mr. Thorneloe, does the government
18 have a factual basis?

19 MR. THORNELOE: Yes, your Honor. The
20 government asks the Court to accept the
21 factual basis that is stated in the
22 presentencing report.

23 THE COURT: What says the defense
24 about that stipulation?

25 MR. ATKINS: Yes. Your Honor, we

1 agree with that.

2 THE COURT: Based upon that
3 stipulation and the offense conduct as set
4 forth in the presentence report, the
5 defendant's plea of guilty before the
6 Magistrate Judge and defendant's admission
7 in open Court today, the Court finds
8 there's a factual basis for the entry of
9 the plea of the guilty and enters a
10 verdict and judgment of guilty in this
11 case.

12 Now, Mr. Johnson, your case was
13 referred to the United States Probation
14 Office for a presentence investigation, in
15 preparation of that presentence report.
16 The Court has now received that report.

17 Have you read that report?

18 MR. JOHNSON: Yes, sir.

19 THE COURT: Have you gone over that
20 report with your attorney?

21 MR. JOHNSON: Yes, sir.

22 THE COURT: Do you now believe you
23 understand the contents of that report?

24 MR. JOHNSON: Yes, your Honor.

25 THE COURT: Counsel, have you gone

1 over that report with you client and do
2 you believe he understands the contents of
3 that report?

4 MR. ATKINS: I have, and I do, your
5 Honor.

6 THE COURT: Thank you.

7 Are there any objections to the
8 presentence report which remain
9 outstanding today?

10 MR. ATKINS: Your Honor, the
11 government noted in the memo they filed
12 yesterday that we will be withdrawing most
13 of our objections, particularly as we had
14 upon a factual basis as relates to who the
15 government has termed Child Victim Number
16 2.

17 Benjamin, at this point in time,
18 would like to just accept responsibilities
19 for his actions and move on. He doesn't
20 feel the need to prolong this hearing any
21 longer than necessary; expose the victim
22 or the Court to any furtherance of detail
23 within that matter.

24 Your Honor, I do think, upon
25 discovery review there is ample evidence

1 to support the statements in the factual
2 basis as presented to the Court. We will
3 withdraw our objections as to that, your
4 Honor.

5 However, I would like to still be
6 heard on objection number eight as relates
7 to the Chapter 41.5 Section B enhancement
8 at the appropriate time.

9 THE COURT: All right.

10 MR. ATKINS: May my client sit down?

11 THE COURT: Yes, sir.

12 MR. ATKINS: Judge, I think once
13 we've withdrawn our objections to evidence
14 as relates to CV2, there certainly is the
15 opening and the commentary from that
16 guideline that allows for the probation
17 office to include that in enhancement for
18 Mr. Johnson's guidelines sentence.

19 I do think it also allows the Court
20 to legally use that. I don't believe the
21 government objects to use of that and
22 probably would agree with it, your Honor.

23 However, I would direct the Court's
24 attention to the language of the actual
25 guideline, 4B1.5 section (b) little 2. It

1 says in the description of occasion of
2 prohibited sexual conduct, that an
3 occasion of prohibited sexual conduct may
4 be considered for the purpose of this
5 subsection.

6 And your Honor, I think the way that
7 the government and the probation office
8 got to using this for Benjamin, has no
9 record whatsoever, is that if the conduct,
10 as relates to CV2 is taken into
11 consideration, that it would be considered
12 another occasion of prohibited sexual
13 conduct different from the instant offense
14 which he pled to, which is the coercion
15 and enticement of a minor, the first CV1,
16 your Honor.

17 I think that that language, your
18 Honor, along with the language at the
19 bottom, if you look under background, it
20 says, this guideline applies to offenders
21 who, in the instance offense and
22 conviction is a sex offense committed
23 against a minor. Obviously, that applies
24 here, your Honor. However, it does say
25 "and", not either or, but "and who present

1 a continuing danger to the public," Judge.

2 I think all things taken into
3 consideration, may is not shall. May is
4 not must. May is not should.

5 It is that the Court can apply this
6 guideline if the Court feels that Benjamin
7 is a continuing danger to the public,
8 Judge. I just don't think that is the
9 case here.

10 I don't think it is an appropriate
11 time to bring my objection and go through
12 my entire sentencing memorandum. However,
13 I do think that the fact the incident is
14 four years old, has never committed an
15 offense of this nature, obviously will not
16 be a Navy recruiter once he's finished
17 with this term of incarceration, as well
18 as all the commendations he received, the
19 letters you saw from his family and
20 friends in the Navy, all would lend the
21 Court the conclusion, and by the
22 preponderance of the evidence, I think the
23 Court will be able to find that he will
24 not be a continuing danger to the public
25 once released, Judge.

1 So I don't think it's a necessary
2 guideline. I think it's a little bit of
3 overkill in this particular case. I think
4 the nature and the purpose of this law,
5 and this guideline, as issued by the
6 sentencing commission was to further
7 punish sex offenders who were not getting
8 it the first time. So maybe the guideline
9 didn't take into account certainly the
10 statutory maximum and minimums, Judge,
11 that are pretty severe in these kinds of
12 cases. But someone commits these crimes,
13 goes back out into the community and
14 society and decides to commit them again
15 and can't stop themselves, this guideline
16 is to say, not only are you subject to the
17 increased statutory minimums or maximums,
18 your Honor, but you're also going to be
19 sentenced to the guidelines much higher
20 because you obviously are not getting it.
21 You obviously -- the incarceration first
22 time around wasn't good enough.

23 So here is an additional enhancement
24 to your sentence, whatever that person's
25 criminal history may be.

1 We don't think it applies in this
2 case. I don't think Ben is a repeat and
3 dangerous offender, whatsoever, Judge. We
4 would hope the Court would not consider
5 that when considering -- when fashioning
6 his guideline range for this sentence.

7 THE COURT: All right. Let me hear
8 from the government.

9 MR. THORNELOE: Your Honor, we think
10 it does apply. Sometimes there will be
11 cases where the conduct is more egregious
12 than others, obviously. I hope this
13 won't -- this probably is not the most
14 egregious case you will ever see or have
15 seen.

16 We're are saying that the occasion of
17 prohibited sexual conduct may be
18 considered. I think, really, all that is
19 saying is the -- the language that follows
20 are situations that don't preclude it from
21 being considered. So all it is saying is
22 it doesn't matter that it didn't have a
23 conviction. It doesn't matter that it
24 occurred during the instant -- of the
25 current conviction. These are still

1 things that make it eligible for
2 consideration. Perhaps there would be
3 something else that would knock it out for
4 consideration for some other reason. It
5 doesn't -- but the specific category of
6 offenses that are eligible for
7 consideration. But production of child
8 pornography is clearly stated that that is
9 the type of offense to be considered.

10 Frankly, Your Honor, CV -- the
11 offense of CV2 are not really that much
12 different than the offense of a CV1. And
13 we should consider offenders who have done
14 an offense twice, or have had more than
15 just one moment of indiscretion, to be
16 worse than offenders who have just had
17 this one particular instance of
18 regrettable conduct.

19 You're right, your Honor, he didn't
20 get intercepted by law enforcement between
21 these events. But, still, it
22 distinguishes him from other offenders who
23 only committed one offense. So we think
24 it is properly applied, though.

25 THE COURT: It appears to technically

1 fit exactly what the government is talking
2 about. It's -- it's -- there are two
3 separate incidents in here which form a
4 pattern and barely -- it barely meets
5 that.

6 In fact, as it turns out in here,
7 based on the factual basis, talking about
8 the offense, apparently, it's one of the
9 victims you're already producing, and
10 sent -- and sent already-produced
11 materials, I'm sure, which realizes that
12 there's some of that going on in high
13 school, but it does technically fit that.
14 And this is a serious matter. I mean, the
15 facts in the situation are very, very
16 serious.

17 Courts have always been concerned
18 where there is actually something going on
19 between a defendant in a child pornography
20 case as opposed to where all the evidence
21 is there, although, there is some concern,
22 that there is activity also, but when the
23 evidence is there, we don't convict in
24 this country on maybe there. We don't
25 convict in this country on it possibly,

1 might be there.

2 The Court is not going to always do
3 the heavy lifting for the government.
4 They can always charge someone and find
5 them guilty beyond a reasonable doubt as
6 opposed to having the Court make these
7 findings.

8 But based on what the facts are
9 herein, it would appear this is going to
10 fit the conduct -- the conduct here fits
11 the five-level enhancement. So although
12 it barely -- it is -- there is not a up to
13 five, or an under five, or whatever. It
14 jumps to five. So if the Court thinks
15 anything on there -- there is also, we
16 have the two-level for the computer, which
17 if there's ever been a case brought in the
18 last 10 years that didn't involve a
19 computer, I'd like to know about it, at
20 least in this district. You can't have
21 an -- at least nobody is going after them
22 without a computer.

23 Back when I first was a prosecutor we
24 had mailings. People were mailing stuff.
25 I did prosecute one of these from stuff

1 that was mailed, United States Mail. So
2 now it is all in computers now.

3 So I'm going to overrule the
4 objection. I understand the "may", but I
5 think the Court has to look and see if
6 there is anything the Court is going to do
7 in this particular case under these fact
8 situations.

9 It results in a huge sentence. I
10 mean, the five-level makes the correct
11 guideline range -- and I will note the
12 objection of the defendant -- goes from 35
13 to 40, after you take off three levels for
14 acceptance. And with a criminal history
15 category of one, the lowest criminal
16 history category you have, it's 292 to 365
17 months, which is roughly getting close to
18 25 to 30 years. That is a long sentence.
19 But it's very dangerous where there is
20 this kind of contact.

21 So I'm going to find that that is the
22 proper guideline range, and want to hear
23 arguments on what I should do based on
24 that. And Mr. Thorneloe is technically
25 correct. I read everything in here, and

1 read over again. Took a little more deep
2 look at it. Based on the objection and
3 talking here today and trying to look back
4 over it, with the idea of this production.
5 These are people that normally -- I keep
6 wondering if we're going to get in here
7 the guys that are producing all this stuff
8 that's on the internet. I mean, it's
9 awful. It's send-in-the-drones awful.
10 It's awful stuff. I'd love to -- I hope
11 someday someone will find one of those
12 people that produces all the horrible
13 stuff that we have.

14 This is really -- I don't know --
15 this is not big-time production, but it
16 fits the technical -- I've always said
17 guidelines and guideline enhancements are
18 based upon a technical reading of these
19 things. It's not -- this is not a what I
20 think ought to happen or anything like
21 that, or do I think, you know, five points
22 for this is a lot. It is based on
23 technical- -- so I find that this is
24 proper here, and that the proper guideline
25 ranges is 292 to 365.

1 So I'll hear from everyone on
2 sentencing at this time.

3 MR. THORNELOE: Your Honor, I'm sorry
4 you're correct, I was going to say that
5 the guideline will be 360, but this isn't
6 production technically.

7 THE COURT: Right. It's under three.
8 Exactly. It is not -- he did -- what he
9 did was he enticed a minor to produce a
10 picture, but at first she didn't produce.
11 She did send him the picture. But she had
12 actually done the production earlier,
13 possibly for someone else, that we don't
14 know. But later, yes, she did a new
15 production. And then number two did a
16 production at his request.

17 MR. THORNELOE: And we very
18 purposefully wrote the factual basis to be
19 clear that what he's responsible for as
20 production versus what may have already
21 existed.

22 THE COURT: Exactly. It is very
23 clear to me in there. It is very clear
24 that as to what the facts are. Still
25 very, very vague because of the direct

1 contact with that -- the high school --
2 high school boys and girls don't have
3 their minds fully formed, and they can't
4 realize -- they can't realize -- they
5 don't get fully formed until they're
6 almost 30, and to not realize when they
7 started doing this stuff, it could be out
8 there forever. It could be out there
9 forever, when they have their families and
10 all that, all this stuff could be there
11 forever.

12 Now, there is some adults that,
13 apparently, their minds are never fully
14 formed and they do that sort of thing.

15 You have to try to protect that --
16 you have to protect the smallest and the
17 weakest.

18 All right. Let me hear from the
19 defense on sentencing in this case.

20 I'm considering the possibility of
21 not including the two levels for the
22 computer, or doing a variance because of
23 that, because it's in every case. It's in
24 every single case it's an enhancement.
25 And I can't imagine how we could have a

1 case in the modern times that does not
2 include a computer.

3 MR. ATKINS: Correct, your Honor.

4 THE COURT: That is the enhancement
5 that almost every judge says that they
6 don't like. Then there is a variance.
7 Some judges think that some of the -- the
8 number of images is -- is a big problem.

9 This is not an image case. This is a
10 -- this is a direct sexual act case. But
11 I know -- I can see exactly how it
12 happened. And the facts of it are that it
13 barely adds with -- it barely gets there
14 with the five-level. Mr. Thorneloe is
15 right. It is a -- it meets this
16 guideline. I understand "may" is in
17 there, but this is more than one. This
18 was getting -- this appeared to be that
19 left unchecked, there might have been a
20 CV3, 4, 5. So it was moving on. New
21 people came into the school.

22 MR. ATKINS: Thank you, your Honor.
23 And I certainly understand the Court's
24 ruling on that.

25 Your Honor, if I could move on to

1 address my sentencing memo and why,
2 especially in light of the Court's
3 findings that five-level enhancement does
4 apply, as you know, when you get into the
5 range of anything over level 30, every
6 step up is a big jump. It's not like when
7 you're at 1 through 15. Each level might
8 be five or six months. We are talking
9 about multiple years' difference here,
10 your Honor.

11 And I want to start off, Judge, by
12 saying that Ben definitely regrets being
13 here before you today. He is ashamed,
14 ashamed for his family, and his kids, and
15 what they've had to go through. And you
16 will hear from him briefly a bit later,
17 your Honor. He has prepared a statement,
18 if the Court will allow.

19 So I am going to talk to you about
20 the 3553(a) factors of what I think are
21 all over this case that would warrant a
22 downward variance.

23 I'm not going to repeat my entire
24 sentencing memo again. I know the Court's
25 read it. I know you've read the great

1 letters that were sent forth from his
2 family and Navy buddies. Judge, what I
3 would like to do is highlight the most
4 important in my mind, for the record,
5 Judge.

6 And I think it starts off with the
7 nature and circumstances of this offense,
8 your Honor.

9 You already touched on some of this
10 Judge. In all total there is six images,
11 four from CV1, two from CV2 that could be
12 considered child pornography, Judge. So
13 it's not in the amount of images in cases
14 that this Court sees often. It's very low
15 on -- on the spectrum as far as that goes,
16 your Honor. So I think that is something
17 worth noting.

18 In addition, Judge, there is no
19 alleged direct contact outside of, I
20 guess, meeting each other in the school,
21 with the second CV2. CV1 has alleged
22 kissing incident, Judge, but overall there
23 is no alleged direct sexual contact, as
24 you see lots of times in these cases,
25 unfortunately. So I think that is

1 something that warrants consideration for
2 a downward variance.

3 In addition, Judge, I think, like you
4 said, obviously high school kids don't
5 have their brains fully formed. They will
6 do dumb things, and legally are not
7 allowed to consent to anything, but I do
8 think it's noted that the ages of the two
9 victims are 15 and 17. We are not talking
10 about prepubescent kids. We're not
11 talking about little bitty kids, or
12 toddlers, or anything like that. And
13 relative to the cases that, unfortunately,
14 you have to deal with. I think this puts
15 this case at the lowest end of the
16 spectrum on that as well, Judge.

17 In addition, there is no evidence
18 that Johnson ever disseminated these
19 images, shared them, showed them to any of
20 his buddies, anything of that nature. In
21 fact, they were in the deep recesses of
22 his phone so far that on the initial
23 search warrant, nothing was even found.

24 It was later on when new technology
25 was developed, that Tony Johnson at APD

1 was able to pull these out of his deep
2 discarded memory cache, Judge.

3 So he doesn't have all this stuff on
4 his computer. He's not out there
5 spreading it. He's not sharing it from
6 phone to phone. And there's probably a
7 good reason for that. He is married with
8 four children, Judge. And obviously, I am
9 not condoning that, but I think in the
10 light of a lot of these cases that you see
11 of this nature, that should be taken of
12 note here, your Honor.

13 I would like to also turn around,
14 Judge, and address his history and
15 characteristics. Obviously, he doesn't
16 have any criminal history whatsoever, not
17 even a speeding ticket, I'm aware of, your
18 Honor. The only charges he ever faced
19 were the state charges that were directly
20 related to this that were dismissed, once
21 he entered a guilty plea.

22 He did serve his country, Judge, for
23 19 years, 11 months and one week. You saw
24 my collateral consequences section. Why
25 that is relevant: His family is going to

1 be left with nothing now. No benefits.
2 No future retirement. It's all gone.
3 That kind of time and service to our
4 country, completely forgotten, erased and
5 even condemned by the government, Judge,
6 based on some -- I think Ben will tell you
7 -- idiotic and selfish actions on his
8 part. I think do it's notable that he did
9 spend that much time serving our nation in
10 the Navy, Judge.

11 During that time -- during that
12 almost 20-year career he did accumulate
13 over 20 commendations. We listed all
14 those in the presentence report.

15 He has long been the center of
16 support for his family, his extended
17 family. Chantel talked to you very
18 vividly in her letter about the situation
19 he helped pull her out of. Sean, his
20 buddy, and former recruiting cohort,
21 talked to you about the situation with his
22 son and her child and the things that Ben
23 did for them, Judge.

24 I think you see in these letters a
25 pattern that in the history of Ben's life,

1 this is all very uncharacteristic of who
2 he is as a person, Judge.

3 I think that ties into the next part
4 of 3553(a), Judge, is the need for, to
5 show the severity of this offense and the
6 just punishment. Those are built into the
7 statutory guidelines.

8 You know, he could be a level 10.
9 The Court's got to give him 10 years
10 incarceration minimum. That is a very,
11 very serious sentence for someone who has
12 never been in jail before.

13 I know we see cases that give out 20,
14 25-year sentences in these cases all the
15 time. But for someone who has never been
16 in trouble in his life, has the reputation
17 and background that Benjamin Johnson has,
18 10 years in a federal prison is a very
19 serious sentence. It's very just, I
20 think, in a case like this, as reflected
21 by the statutory minimum.

22 Your Honor, I do think it's fitting,
23 and would fit that 3553(a) factor, which
24 the Court must consider in fashioning a
25 sentence for him, Judge.

1 As far as specific and general
2 deterrence, your Honor, generally I think
3 it is very evident that anybody who
4 commits a crime of these natures are going
5 to be suffering some dire consequences.
6 Courts are limited in what they can do in
7 these cases. Obviously probation is not a
8 valid or viable punishment. They're
9 looking at serious, long-term minimum
10 incarceration sentences. And I think that
11 exists.

12 But specifically for Ben, this has
13 completely ruined his life. It's ruined
14 his family's life. They are going to be
15 dealing with this for at least a decade
16 and years after that. He is going to have
17 to register, presumably, for the rest of
18 his life. That is going to follow him
19 around at every neighborhood he goes to,
20 every community they try to establish
21 himself in. Any job he tries to get,
22 Judge.

23 So these are all very specific
24 deterrences, outside of the fact he is at
25 least going to be out of society for the

1 next decade. I think that is all
2 reflected, in a sense, that we are
3 requesting.

4 Your Honor, I did try to look for --
5 and I had Federal Defender's Office help
6 me, for cases similar to this one that
7 this Court sentenced. Obviously, one of
8 the things that you are to consider under
9 3553(a) is the sentencing disparities
10 amongst similarly situated defendants.

11 Quite frankly, I could not find one.
12 There is not a similar fact and
13 circumstance that this court has seen.

14 The closest thing I could see in what
15 had been charged/pled to the Court had
16 sentenced someone was the case of Martin
17 Meggett, which the Court sentenced earlier
18 this year. That's 15 CR 89 -- I believe
19 it was -- 3:15 CR 89.

20 And Mr. Meggett was charged with
21 coercion and enticement of a minor, just
22 like Mr. Johnson's pled to in this case.
23 But he ultimately pled to one count of sex
24 trafficking with child by force, fraud or
25 for coercion.

1 The reason that case is similar is
2 the age of the girl is similar. She's a
3 teenager, Judge. But where it is
4 dissimilar, and I think more severe than
5 what Benjamin did is that he was actively
6 engaged in child prostitution with this
7 girl. And she was giving him money, in
8 essence acting as a pimp to her, I
9 believe, from the fact pattern I read.

10 In that case this Court sentenced him
11 to 120 months, your Honor.

12 While what Ben did is extremely
13 serious, and should be taken into
14 consideration, all these factors, I don't
15 think it is more serious than child
16 prostitution, and therefore, I do think he
17 should not be sentenced more harshly than
18 Mr. Megget was in that 120-month sentence,
19 your Honor.

20 The government, in their sentencing
21 memorandum said they don't think it should
22 be less than 180 months, Judge. And I
23 think that is actually the ceiling for
24 this case. I don't think it should be any
25 harsher than that. And I do think the

1 minimum accomplishes all the goals of
2 3553(a), Judge, along with the collateral
3 consequences.

4 A lot of courts are starting to take
5 into consideration these days, us defense
6 attorneys like to call it collateral
7 punishment, because that is what it is.
8 The person's punished well beyond what the
9 Court actually does here in court today
10 once they are out.

11 I don't know if the Court has had a
12 chance to read that opinion from Judge
13 Block in New York, but it's like
14 50-page article -- and it's in a simple
15 cocaine trafficking felony cocaine case.
16 I do think the facts, as I listed them
17 there, Judge, again, I'm not going to go
18 through all of them.

19 THE COURT: Judges have all kinds of
20 opinions. You can go to the Southern
21 District of Georgia and they vary
22 5 percent of the time.

23 If you go to the District of
24 Massachusetts, and it is a varying -- they
25 vary almost all the time. It just depends

1 on where you are.

2 MR. ATKINS: Certainly, Judge.

3 THE COURT: I have specific things
4 that I look at.

5 This one is real horrible for me
6 because, as you said, there really is not
7 anything that I have, and there was not --
8 that they did not reach the point where
9 they were engaging in sex.

10 MR. ATKINS: Correct, your Honor.
11 Your Honor, I hope the Court would
12 consider the letters that were sent. I
13 think they were all heartfelt. I think
14 they were honest. I don't think they ran
15 away from the fact that Benjamin accepts
16 responsibility for this and what he did
17 was wrong.

18 But again, his life is ruined from
19 this point forward, you know, and the
20 minimum, certainly, while seemingly might
21 not be that harsh in light of this
22 guideline range that he's looking at, I do
23 think it's fitting. I do think it is
24 appropriate for Ben particularly, and I
25 think that all the reasons that we have

1 listed and discussed here today make it
2 that way.

3 You know, I think if we did have a
4 five-level enhancement, which the Court
5 did agree barely fits, but I guess it does
6 fit, if we did have that, I would not be
7 asking about a two or three-level variance
8 downward. But since we are considering
9 that, Judge, it is a pretty large
10 variance. But I do think this is the one
11 case, because it is so unique, and because
12 we don't see cases like this in federal
13 court every day, low number of images like
14 this, there was no sexual contact, things
15 like that, Judge, I do think it does
16 deserve the minimum, the statutory minimum
17 of 120 months, and that is what we'll be
18 requesting here today.

19 THE COURT: Let me hear from the
20 defendant. Anything you wish to say,
21 Mr. Johnson?

22 MR. JOHNSON: Yes, your Honor. Your
23 Honor, there aren't really words to
24 describe my feelings about all of this.
25 But I do know I have hurt -- I have

1 betrayed my wife, my children. Betrayed
2 my family and friends. I hurt innocent
3 people.

4 I placed the United States Navy in a
5 very bad limelight that they did not
6 deserve. My own selfishness, my lack of
7 maturity, and those egregious mistakes
8 have personally scarred my own life. I
9 allowed myself to slip, and I am
10 regretfully sorry for all the damage that
11 I brought.

12 I only wish to be reunited with -- in
13 the loving arms of my family as soon as
14 possible. And make the best of the time
15 that I do have to do while I'm away.

16 In a sense, I'm looking at this as my
17 final deployment, which is by far, the
18 worst thing that anyone ever has to do in
19 the military.

20 Unfortunately, the ones that suffer
21 out of all this the most are the spouse
22 and children.

23 Thank you for listening to me, and
24 for taking the words of my friends and my
25 family into account.

1 THE COURT: Thank you.

2 MR. THORNELOE: Thank your, Honor. I
3 very much hope we don't see a case quite
4 like this again. It is very disturbing to
5 every member of this prosecution team. It
6 affects a lot of veterans in this room
7 here today, everybody sitting here over.
8 So we have an understanding of what's at
9 stake in a case like this, I think.

10 Early on in this case, I had been
11 talking to the Navy. And there was a
12 choice to make about whether this should
13 proceed as a court martial, because he was
14 an active duty service member, or we would
15 come here. And the Navy entrusted us to
16 proceed with this case, that we would do
17 the right thing.

18 THE COURT: What would they have done
19 in a court martial?

20 MR. THORNELOE: Your Honor, I can't
21 say for sure, because there is some
22 discretion here, and it's prosecutorial
23 discretion just like anywhere else. But
24 more likely than not, there would have
25 been a general court martial, which is the

1 military equivalent of a felony level
2 trial.

3 And you would have penalties --
4 possible penalties that are similar to
5 what we have here. And sex offender
6 registrations, the same federal sex
7 offender registration that we have here.
8 An individual can go to a military prison.
9 Although, at times, individuals do go to
10 the DOP --

11 THE COURT: Do you know what the
12 sentence would be in state court, if this
13 case was brought into state court for the
14 actions here? Because you don't have any
15 direct physical sex that has happened. We
16 have sexually related production of
17 pictures that are sent back and forth.

18 MR. THORNELOE: Your Honor, I can't
19 say that I've run that calculation here
20 for the courts. I don't want to take a
21 guess, because if I'm wrong, I don't think
22 I have been helpful. So I don't want to
23 guess at that.

24 I suspect Mr. Atkins will want to
25 pipe up and chime in on this in a moment.

1 But I suspect less. It's not common for
2 federal child pornography related charges
3 to come -- or child pornography charges to
4 come here, because they are more severe --

5 THE COURT: Sometimes -- sometimes if
6 the pictures of whatever happened, if it
7 actually happened, sometimes, unless it's
8 just really a sexual act with a minor will
9 receive less -- less time for the actual
10 indecent liberties received for taking a
11 picture with -- can will receive less in
12 state court than pictures will.

13 MR. THORNELOE: Yes, your Honor. We
14 can certainly come up with those examples
15 of 17-year olds who are at age of consent
16 and things along those lines.

17 THE COURT: I understand.

18 MR. ATKINS: Judge, I will tell you
19 the presumptive range if he would have
20 been offered a standard plea offer in
21 those cases, which I never received one
22 because they anticipated going federal,
23 but the sexual exploitation of a minor,
24 which will be state equivalent of the
25 exchange of pictures with someone

1 underage, would have been a class C; I
2 think you're looking at about five or six
3 years active, somewhere in that range,
4 if -- for one count. So I don't know how
5 many --

6 THE COURT: It's going to be a lot
7 more than that.

8 What I'm trying to do is put all this
9 in perspective, because we want to avoid
10 unwarranted sentencing disparity. I try
11 to definitely do it in my cases. I can't
12 listen to New York or Massachusetts
13 because they are not helpful to me, but
14 neither is the Southern District of
15 Georgia. I try to be somewhere -- try to
16 listen to all and try to figure out what
17 the right of this is. All these sentences
18 are big -- are huge.

19 The thing that goes through the
20 Court's mind in trying to fashion the
21 right sentence is, is this going to be a
22 recidivist? Does he have such a problem?
23 And I don't know what the answer to that
24 is. There's no actual -- even though
25 there appear to be a number of

1 opportunities to have sex or to try to
2 lure someone to have sex, he really never
3 did that. Never did have sex.

4 He took one girl on a trip, and there
5 was a suspicion that there was another
6 trip coming up that might have -- but
7 nothing happened on these of a full sexual
8 nature. I think there was some kissing or
9 something.

10 MR. THORNELOE: That is correct, your
11 Honor. We don't allege that a completed
12 sexual act occurred.

13 THE COURT: Tell me what you think is
14 fair in this. I know you think the
15 guidelines are okay. I think that the
16 five points are really -- in this
17 particular case -- is a pretty big hammer.
18 I think there is something -- that some of
19 that ought to be on there, but I'm not --
20 that is huge -- and that goes up from that
21 particular five-point enhancement -- five
22 itself goes from a low end of 168 months,
23 which is 14 years, and jumps him up to
24 about 25 years on the low end. This is a
25 10-year jump.

1 MR. THORNELOE: Yes, your Honor. And
2 I see that, your Honor, but I also see
3 that the guidelines are looking for
4 defendants who have more than one
5 indiscretion. They are looking for people
6 who have multiple victims that do
7 something like this over a period of time.
8 And we do see that over a period of time
9 that this occurred. And it was --

10 THE COURT: You set that out very
11 fairly in there. The factual basis in
12 here is very fair. Puts everything in
13 there. You're not trying to make anybody
14 out to be anything that they are not.

15 MR. THORNELOE: Thank you, your
16 Honor.

17 I do want to point out that with
18 respect to the defendant's service to the
19 Navy, and where that -- what that -- how
20 the Court should take that into account --
21 well, I will say the Navy took that into
22 account.

23 The Navy had an administrative
24 hearing and found that on the whole, his
25 career is to be characterized as "Other

1 Than Honorable." That is their opinion.
2 That is where he landed. And that is the
3 most severe thing that they could do to
4 him without the court martial. That is
5 the most severe discharge that they could
6 give him. Entrusted us to take the
7 criminal piece additional step.

8 And as for how we should regard what
9 this means to his family, well, one way to
10 look at that is his family is punished for
11 this. But another way to look at it is he
12 full well knew that that could be the
13 result. And he committed a selfish act
14 that had a consequence of betraying his
15 family. And that is not an honorable
16 thing.

17 The Court, I don't think, should
18 necessarily consider that the family is
19 along for the ride. That is a tragic
20 thing. And I have sympathy for the family
21 who is involved in this. They are
22 innocent in every way.

23 But that is part of being an adult.
24 That's part of being a man, and providing
25 for your family, that you would not do a

1 thing like that to them.

2 Your Honor, with respect to what we
3 should do here. We have to consider the
4 victims in this case. There are two of
5 them. They are not here today. This has
6 been a hard road for them.

7 One thing that's, I think, important
8 for the Court to know about these two
9 girls in this case is these weren't the
10 girl next door with mom and dad at home
11 and everything going right for them. I
12 don't think that is just a coincidence.
13 Sometimes those types of victims can be
14 the most easy prey.

15 And since this has happened, they are
16 not doing better. Life is not on a good
17 trajectory. They chose not to be here
18 today. They are trying to put this behind
19 them. To them, this was three years ago.
20 To a teenager, that's a lifetime. I hope
21 they can put this behind them and do
22 better one day. But I can't stand here
23 and tell you this has been an easy road
24 for them and they are on a good
25 trajectory.

1 Your Honor, with respect to what this
2 is worth, we do think that the plus five,
3 maybe you will find it's a little
4 weightier than it should be, but we do
5 think it distinguishes him to some degree
6 from other individuals who committed only
7 one offense, because that's not him.
8 There is a course of conduct here. There
9 is not just one day, or one moment, or one
10 e-mail. So we think you should consider
11 it some.

12 We looked at other cases. We did the
13 best we could as well.

14 I stood with you when Jason Brown
15 came before the Court. He did some really
16 bad things, and you gave him 240 months.
17 Can I say that what this defendant did is
18 worse? Maybe not. But it's a lot
19 different. So I think --

20 THE COURT: It's worth a significant
21 sentence. There is no question about it.

22 MR. THORNELOE: So your Honor, as I
23 said in my sentencing memorandum, we think
24 that 180 months should be the least
25 sentence you should give. We do not

1 abandon the guidelines. We think that the
2 points are fairly deserved here today.
3 They're articulated in the guidelines as
4 being appropriate to apply, and we ask
5 your Honor to take the things that we've
6 offered to you into consideration.

7 The letter from the commander of the
8 defendant, I think spoke as well as anyone
9 could about the impact on the Navy. There
10 is an impact on national security, and
11 there's a betrayal of trust to the
12 children in the community by doing what
13 this defendant did.

14 So your Honor, we ask impose a fair
15 sentence, and we will leave it at that. I
16 do ask that you impose a lifetime of
17 supervised release.

18 THE COURT: That will happen.

19 MR. THORNELOE: Thank you, your
20 Honor.

21 With that, that is all the government
22 has. Thank you.

23 THE COURT: There are a couple of
24 things in here that this Court is
25 considering in what I would vary from the

1 guideline in this particular case, which
2 is 292 to 200- -- to 365 months, which is
3 north of 30 years. And I have been in
4 this business a long time, and I have seen
5 people charged with murder get less than
6 30 years.

7 So I'm trying to figure the just
8 punishment for this and the deterrent
9 effect of this activity, since it seems
10 that so many people think that this is a
11 good idea to send this stuff around. It
12 is just breathtaking that you people think
13 this is a good idea.

14 But these are tough sentences, which
15 is why I vary a lot, and Mr. Thorneloe
16 knows this, in cases which just involved
17 photographs, even when there is a lot of
18 them, where there is no evidence of any
19 physical activity.

20 This really is a direct sex crime,
21 which has been aggravated by the fact that
22 these pictures were passed back and forth.

23 I realize that the state would have
24 been way, way less. That does impact the
25 Court's thought process in this because it

1 does matter who takes these cases. But --
2 but this is a federal case with federal
3 sentencing guidelines and the Court does
4 respect those guidelines.

5 The things that are impacting are
6 number one, the two-level, two levels for
7 the computer. And the total of five
8 levels, which comes up because there were
9 two individuals whose photographs were
10 shared.

11 Once again, no -- no sexual activity
12 was involved within either of these
13 victims.

14 So I'm trying to figure out where the
15 right of that comes in. If the five
16 points weren't there, it would be a 1- --
17 and the computer was there -- it would be
18 168 to 210.

19 If the computer was there, it would
20 be 135 to 168. And that would be too
21 much. And the 168 to 210 appears, in this
22 case, to probably be an awful big stretch
23 to get out of this. So what do I?

24 The Court is going to do, considering
25 what an appropriate sentence ought to be

1 in this case, is vary. And considering
2 its variance is considering the two levels
3 of computer use, which is almost always
4 indeed computer/phone use.

5 And then considering the fact that
6 with the five levels and all that is in
7 there, the Court is going to vary for both
8 or all those things together, considering
9 3553(a) factors, which do, as bad as this
10 was with regard to his -- to the fact that
11 he was in the Navy, the fact that he has
12 served this country. The fact that he has
13 no criminal record. The fact that he has
14 done all these commendations. You get
15 something for the good that you have done.
16 He is getting a lot for the bad he has
17 done. But you get something for the good
18 that you have done, before you did these
19 things.

20 The Court has -- why -- why there was
21 this move in this direction, I do not
22 know. But in looking at everything, I
23 believe a strong deterrent sentence can be
24 had here, which will provide just
25 punishment for this defendant for the

1 offense that was committed, which will
2 promote respect for the law, which will
3 take into consideration all the good
4 things that the defendant has done. Will
5 also protect the public from further
6 crimes of this defendant, both during the
7 time he is in prison and during the rest
8 of his life when he's on supervisory
9 release for life.

10 And will also deter anybody else who
11 thinks this is a good idea. If you look
12 at these fact situations in this
13 particular case, the sentence that is
14 going to be given here today, if that
15 doesn't deter someone else, then they
16 probably need a life sentence because they
17 are not going to be deterred by anything.
18 These are big sentences. This is going to
19 be a big sentence.

20 I appreciate the government for
21 bringing it. I appreciate the
22 investigators for doing the work that they
23 did on this. The question is, what is the
24 right thing, is really what it comes down
25 to. And they put me here because I get to

1 try to figure it out between all this.

2 So the range that I'm going to put it
3 in -- I have to figure out where I'm going
4 to sentence in that range. I'm going to
5 vary down to level 36, which is a range of
6 188 to 235 months, which is a little north
7 of 15 years, to just under 20. And I'm
8 going to sentence in there, considering
9 all of these factors.

10 I haven't decided yet exactly what
11 sentence I'm going to give. I'm going to
12 think about it here for a minute. It is
13 also to avoid unwarranted sentencing
14 disparity of other similar situated
15 defendants. Although, the Court has not
16 had anything exactly like this. In
17 comparing the Brown case to some others
18 that I have had, I think this -- this fits
19 in appropriately with that sentence.

20 Also, I do take into some
21 consideration what would happen in
22 Buncombe County, North Carolina if this
23 case was in the state courts. That also
24 brings it down some, but I can't go
25 anywhere near where the states gives on

1 this. It's just not -- it's a serious
2 matter. And congress has said that it's a
3 serious matter. These guidelines are
4 thought about back and forth between
5 defense attorneys, prosecutors and
6 everybody else. And there's some things
7 in here sometimes that go -- that go a
8 little bit harsher than they should
9 because they allow the judges to take care
10 of those, and I think I'm doing that
11 appropriately under all circumstances.

12 All right stand up, please, sir.

13 (Defendant complies)

14 THE COURT: Pursuant to the
15 Sentencing Reform Act of 1984 USC
16 Booker -- and another thing that has come
17 into this is the fact that there was no
18 sex that actually occurred in this
19 particular case.

20 Pursuant to the Sentencing Reform Act
21 of 1984 in USC Booker, it's the judgment
22 of the Court having considered the factors
23 noted in 18 United States Code Section
24 3553(a), the defendant Benjamin Ernest
25 Johnson is hereby committed to the custody

1 of the United States Bureau of Prisons for
2 a term of 204 months, 17 years.

3 The Court recommends that the
4 defendant participate in a sex offender
5 treatment program while incarcerated, if
6 eligible. Medical treatment while
7 incarcerated is recommended.

8 It's further ordered the defendant be
9 required to support all dependents from
10 prison while he's incarcerated, as
11 outlined in the presentence report.

12 Upon release of prison, the defendant
13 shall be placed on supervised release for
14 a term of life. Within 72 hours of
15 release from the custody of the Bureau or
16 Prisons, defendant shall report in person
17 to the probation offices in the district
18 which the defendant is released.

19 While on supervised release the
20 defendant shall not commit another
21 federal, state or local crime, and should
22 comply with the standard conditions that
23 are adopted by the court in the Western
24 District of North Carolina, and shall
25 comply with the following additional

1 conditions: Defendant shall have no
2 direct or indirect contact at any time,
3 for any reason, with the victims of this
4 offense, the victim's family or the
5 affected parties in this matter unless
6 provided with specific written
7 authorization to do so in advance by the
8 U.S. Probation Officer.

9 The defendant shall submit to a
10 psychosexual evaluation by a qualified
11 mental health professional experienced in
12 evaluating or managing sexual offenders as
13 approved by the United States Probation
14 Office.

15 The defendant shall complete
16 treatment recommendations and abide by all
17 the rules, requirements and conditions of
18 the program until discharged.

19 The defendant shall take all
20 medications as prescribed.

21 Defendant shall submit to risk
22 assessment, psychological and
23 physiological testing, which may include
24 and is not limited to a polygraph
25 examination and/or Computer Voice Stress

1 Analyzer, CVSA, or other specific tests to
2 monitor the defendant's compliance with
3 supervised release of treatment conditions
4 at the direction of U.S. Probation
5 Officer.

6 The defendant's residence and
7 employment shall be approved by the U.S.
8 Probation Officer. Any proposed change in
9 the residence or employment must be
10 provided to the U.S. Probation Officer at
11 least 10 days prior to the change and
12 preapproved before the change may take
13 place.

14 Defendant shall not possess any
15 materials depicting and/or describing
16 child pornography and/or simulate child
17 pornography as defined to 18 United States
18 Code Section 2256, nor shall the defendant
19 enter any location where such materials
20 can be accessed, obtained or viewed,
21 including pictures, photographs, books
22 writings, drawings, videos, or video
23 games.

24 That is an area you will have to be
25 careful about because a lot of places that

1 have what they call legal pornography may
2 have some of this other stuff in there and
3 you're violating your supervision.

4 The defendant shall comply with the
5 requirements of the Sex Offender
6 Registration and Notification Act, 14
7 United States Code Section 16901 and those
8 that follow.

9 As directed by the probation officer,
10 the Bureau of Prisons or any state sex
11 offender registration agency in which the
12 defendant resides, works, is a student or
13 was convicted of a qualifying offense.

14 The following conditions are ordered
15 to address specific needs and/or risk that
16 are determined by the defendant's criminal
17 history and/or offense history.

18 Defendant shall not associate or have
19 verbal, written, telephonic or electronic
20 communication with any person under the
21 age of 18, except in the presence of the
22 parent or legal guardian of said minor.

23 It's a condition that the defendant
24 notifies the parent or legal guardian of
25 their conviction or prior history and has

1 a written approval from U.S. Probation
2 Officer. This provision does not
3 encompass persons under the age of 18,
4 such as waiters, cashiers, ticket vendors,
5 et cetera, with whom the defendants deal
6 with in order to obtain ordinary and usual
7 commercial services.

8 Defendant shall not use, purchase,
9 possess or procure or otherwise obtain any
10 computer or electronic devices that can be
11 linked in to computer networks, bulletin
12 boards, internet, internet service
13 providers or exchange formats involving
14 computers unless approved by the United
15 States Probation Officer. Such computers,
16 computer hardware, software is subject to
17 warrant, searches and/or seizures by the
18 US Probation Officer.

19 To the extent that the probation
20 office can monitor these matters,
21 probation officer should allow him to have
22 these items, as long as they can be
23 monitored.

24 I have no idea what will happen over
25 the next years. It will certainly be

1 changing in all of the -- that needs -- I
2 would like this judgment to be able to
3 be -- to be agile enough to deal with this
4 defendant when he is put on supervision.

5 And shall allow the US Probation
6 Officer or other designee to install
7 software designed to monitor computer
8 activities on any computer defendant is
9 authorized to use. This may include and
10 is not limited to software that may record
11 any and all activities on computers the
12 defendant may use to include the capture
13 of keystrokes, application information
14 internet use history, e-mail
15 correspondence, and check conversations.

16 Defendant should pay any costs
17 related to monitoring computer usage. And
18 shall not use or have installed any
19 programs specifically and solely designed
20 to encrypt data, file folders and volumes
21 of any media.

22 Defendant shall, upon request,
23 immediately provide the probation officer,
24 with any and all passwords required to
25 access data compressed or encrypted for

1 storage by any software.

2 Defendant shall provide a complete
3 record of all passwords, internet service
4 providers, e-mail addresses, e-mail
5 accounts, screen names, et cetera, past
6 and present to the probation officer and
7 shall not make any changes without the
8 prior approval of US probation officer.

9 Defendant shall not use, possess or
10 control any linux accounts or tools.

11 Defendant shall not have any social
12 networking accounts without the approval
13 of the US probation officer.

14 It is ordered that the defendant
15 shall pay the United States a special
16 assessment of \$100.

17 The Court finds the defendant doesn't
18 have the ability to pay a fine or
19 interest. The Court, having considered
20 the facts that it is noted in 18 United
21 States Code Section 3572(a) will waive
22 payment of fine or interest in this case.

23 The defendant will forfeit the
24 defendant's interest in any properties
25 identified by the United States.

1 Payment of the criminal monetary
2 shall be due and payable immediately. The
3 Court has considered the financial and
4 other information contained in the
5 presentencing report and finds the
6 following is feasible:

7 If the defendant is unable to pay any
8 monetary penalties immediately, during the
9 period, the payment shall be made to the
10 Federal Bureau of Prisons. Upon release
11 of imprisonment any remaining balance
12 shall be paid in monthly installments of
13 no less than \$50 commencing within 60 days
14 to be paid in full.

15 Throughout the period of supervision,
16 the probation officer shall monitor the
17 defendant's economic circumstances. And
18 shall report to the Court with
19 recommendations as warranted and any
20 material changes that affect defendant's
21 ability to pay.

22 Is there any legal reason why this
23 sentence in this case should not be as
24 stated, from the defense?

25 MR. ATKINS: No, your Honor.

1 MR. THORNELOE: No, your Honor.

2 THE COURT: Okay. That is the
3 sentence. Very sad case.

4 Sir, you have a right to appeal your
5 conviction and this sentence before the
6 Circuit Court of Appeals. Any notice of
7 appeal is to be filed within 14 days from
8 written entry of judgment in this case.

9 If you're unable to pay for the cost
10 of an appeal you may apply for leave to
11 appeal at no cost to you. If you so
12 request the clerk of the court will
13 prepare and file a notice of appeal on
14 your behalf.

15 I recommend you speak to your
16 excellent counsel about these appellate
17 rights, and whether in this circumstance
18 you wish to exercise them.

19 You have entered a plea agreement,
20 and possibly have given up some of those
21 rights as part of that contract.

22 But do you understand your appellate
23 rights as I just explained them to you?

24 MR. JOHNSON: Yes, your Honor.

25 THE COURT: Anything further from the

1 defense?

2 MR. ATKINS: No, your Honor.

3 THE COURT: Anything further from
4 government?

5 MR. THORNELOE: Yes, your Honor.

6 Government moves to dismiss Counts 1, 3
7 and 4 --

8 THE COURT: Dismissed.

9 This matter is concluded. Thank you.

10 (Proceedings adjourned at 3:13 p.m.)

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1 CERTIFICATE

2 NORTH CAROLINA

3

4 I, the undersigned
5 authority, hereby certify that the foregoing
6 transcript, page 1 through 58 is a true and
7 correct transcription of my stenographic
8 notes, taken before me at the time and place
9 set forth on the title page hereof.

10 I further certify that said
11 witness was duly sworn by me according to
12 law.

13 I further certify that I am
14 not of counsel to any of the parties to said
15 cause or otherwise interested in the event
16 thereof.

17 IN WITNESS WHEREOF I
18 hereunto set my hand and affix official seal
19 this 5th day of February, 2017.

20

21



22 RANDI GARCIA, COURT REPORTER, RPR

23 NOTARY PUBLIC

24

25